

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

THE CEMENT LEAGUE

and

Case 03–CA–126938

**NORTHEAST REGIONAL COUNCIL
OF CARPENTERS**

and

**NEW YORK CITY AND VICINITY
DISTRICT COUNCIL OF CARPENTERS,
PARTY IN INTEREST**

*John Grunert Esq. and Charles Guzak Esq.,
for the General Counsel.*

*Michael Salgo Esq., for The
Cement League.*

*Raymond G. Heineman Esq., for the
Charging Party.*

*James M. Murphy Esq., for the
Party in Interest.*

Decision

Statement of the Case

RAYMOND P. GREEN, Administrative Law Judge. I heard this case on March 25, 2015, in New York City. The charge in this proceeding was filed on April 21, 2014, and the complaint was issued on December 31, 2014. It essentially alleges that a collective-bargaining agreement between The Cement League, an employer association, and the New York City and Vicinity District Council of Carpenters contained provisions granting preference in hiring based on union membership.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed,¹ I make the following

Findings of Fact

I. Jurisdiction

The Cement League is an employer association that bargains on behalf of its employer members with various labor organizations including the New York City and Vicinity District Council of Carpenters(the NYC Council). It is conceded that members of The Cement League, who are engaged in the construction industry, collectively purchase and receive goods on an annual basis, valued in excess of \$50,000 directly from points outside the State of New York. I

¹ The Respondent did not file a Brief.

therefore conclude that The Cement League is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is agreed and I find that the two Carpenter District Councils are labor organizations within the meaning of Section 2(5) of the Act.

II. The alleged unfair labor practice

Although the Respondent in this case is nominally The Cement League, the actual dispute is between two of the Regional Council's of the Carpenters International Union. That dispute relates to under what conditions or limitations, an employer member of The Cement League (or a signatory to The Cement League collective-bargaining agreement), that is doing work in New York City, may hire individuals who are not members of local unions that are not part of the NYC Council. And notwithstanding that this dispute is essentially between two labor organizations, with the employers in the middle, these unions have been unable to resolve this issue internally or with the assistance of their International Union.

The Cement League and the NYC Council have executed a series of successive collective-bargaining agreements for many years. The NYC Council, as a Regional Council, is made up of a group of local carpenter unions. The most recent contract runs from July 1, 2011 to June 30, 2015. Basically, this contract covers work done in the New York Metropolitan area.

The Charging Party is the Northeast Regional Council of Carpenters (the Northeast Council). This Council is made up of various local carpenter unions and its geographic jurisdiction covers northern New Jersey, upstate New York and Long Island.

Historically, members of the unions affiliated with the NYC Council and the Northeast Council have, from time to time, gotten jobs in the respective jurisdictions of each Council. When obtaining such jobs, they would be covered by the applicable collective-bargaining agreement for wages and benefits, but would not be required to change their union membership.² For some time, there was a trend of people going from New York City to New Jersey, Long Island and upstate New York. But in more recent years, the flow has been in the opposite direction with suburban carpenters going to New York City and transferring their membership to locals of the NYC Council. And although in the past, a carpenter member of the Northeast Council who decided to obtain employment in New York City might have simply obtained employment there from an employer-member of The Cement League and worked under the NYC Council contract, that has changed. For the past several years, those upstate or suburban carpenters have been transferring their local union membership from locals affiliated with the Northeast Council to locals affiliated with the New York City Council. More about this later.

Many of the employers who are members of The Cement League are large contractors performing construction work on office buildings and residential apartment buildings and who maintain more or less stable work forces that move from job to job. In the past, the contract between the NYC Council and The Cement League has permitted employers to select up to one half of their work force for any given project, but required them, after the hiring of a foreman and a shop steward, to obtain the other half from the NYC Council out-of-work list; this being a nonexclusive referral system which was not limited to members of the affiliated local unions of the NYC Council. This was memorialized at article VI of the contract covering the period from July 1, 2006 to June 30, 2011.

² It is my understanding that for example when an employee from the Northeast Council got a job in New York City, he would be paid the New York contract rate but the pension and welfare contributions would be transferred to the funds operated by affiliates of the Northeast Council.

In September 1990, the United States Attorney filed a civil RICO action against the NYC Council and some of its officers. (*United States of America v. District Council of New York City and Vicinity Carpenters, et al.*, 90 Civ. 5722). The thrust of this action was the Government's allegations that this labor organization had been engaged in graft and corruption and that it had connections to organized crime. Among the allegations were the assertions that the NYC Council had, through the provisions of its contract and hiring hall, abused the hiring hall system by rewarding associates and punishing dissident union members. It was alleged that the Union and local shop stewards had conspired with employers and had been paid off to allow employers to hire employees "off the books." If proven this would mean that there were instances where employers, with the approval of corrupt union officials and agents, hired employees who were not paid the wages required by the collective-bargaining agreement. It also would mean that those employers would not have made the contractually required payments to various pension and other benefit funds that were established for the benefit of bargaining unit employees.

After a trial commenced in September 1993, the NYC Council offered to settle that case and a consent decree was entered on March, 4, 1994. In part, the settlement provided for the selection of a court appointed monitor, who at the present time is Glen G. McGorty. It also required that the Court approve any new collective-bargaining agreements made by the NYC Council or its affiliated unions.

In 2007, as a result of a contempt proceeding, the Court, in 2009 ordered that the 50:50 hiring ratio be modified so that the employers could now hire 67 percent of their work force from any source whereas 33 percent would be referred by the Union from the out-of-work list. *U.S. District Council of NYC & Vicinity of Carpenters*, 592 F.Supp. 2d 708 (2009).

In April 2010, the District Court, based on a stipulation, entered an Order regarding the appointment of a review officer. This person pursuant to the Order would have the access to all union and union benefit fund records, and would have the powers, inter alia, to conduct investigations, to initiate lawsuits against union officers, agents and employees, to oversee union elections, to discipline union officers, agents and employees, and to supervise job referral rules and procedures.

In May 2013, The Cement League and the NYC Council negotiated modifications to their existing contract and this was ratified on October 9, 2013. Among the issues agreed to was that the employers could, with the limitations described below, man any particular project with employees of their own choosing, without being required to utilize the Union's out-of-work or referral list. The limitation was that in order to do so, *the employer's chosen work force would have to consist of members of the NYC Council.*

On October 23, 2013, United States District Judge Richard M. Berman, after being asked to review a proposed contract, issued an Order which stated; "the Court hereby grants the District Council's application and approves the CBA between the District Council and The Cement League, including its provisions regarding full mobility and anti-corruption technology mechanism."³ The NLRB was not a party to this lawsuit and as far as I can determine there

³ The Court noted that the parties to the agreement were to establish an electronic jobs reporting system. Although this is not described in any detail, I would assume that this mechanism was to enable the monitor to determine the names, job classifications, rates of pay, and hours of work for those persons employed by the members of the NYC Council and to enable the monitor to ascertain whether individuals

was no consideration by any of the parties or the judge as to whether any of the contract's provisions might have been in conflict with the mandates of the National Labor Relations Act.

The contract that was approved by the Court contained the following provisions that the General Counsel claims to discriminate against nonmembers of the affiliated locals of the NYC District Council.

Article VI, Section 2:

Any employees not members of the District Council shall be matched 1:1 from the District Council Job Referral List. The Union will cooperate, in order to meet all legal requirements, and furnish qualified carpenters.

Article VII, Section 2:

For jobs only requiring one (1) or two (2) employees, the Employer will be permitted to work without a certified shop steward without a time limitation. Any employee who is not a member of the District Council will be matched 1:1 from the District Council's Job Referral List.

Article VII, Section 5:

Notwithstanding any other provisions of this Agreement, the Employer shall be permitted to hire any and all Carpenters, except for the Shop Steward and except as otherwise provided in Article VII, Section 2, without reference to hiring ratios (i.e., the Employer will be able to hire Carpenters, except as specifically limited, under so-called full mobility).

Article VII, Section 5(b):

The arbitrator shall be empowered as a remedy to reinstate the 50:50 hiring ratio provisions for the duration of this Agreement for any Employer found to have acted willfully and with the bad intent to violate the staffing and payrolling requirements of this Agreement. Such a remedy would mean that the individual Employer would be required to hire at least fifty percent (50%) of Carpenters from the District Council's Job Referral List (called an Out of Work List or OWL) without the ability to make requests.

Article XIX, Section 35:

... if at any time during the term of this Agreement the United States District Court for the Southern District of New York or any other court of competent jurisdiction voids the provisions of Article VII, Section 2 and Article VII, Section 5 (i.e., the so-called full mobility hiring provisions), this Agreement shall become a nullity and the Parties shall return to the terms and conditions under their collective bargaining agreement that expired on its terms on June 30, 2011.

III Analysis

Among other things, Section 7 of the Act gives employees the right to join a labor organization and the right to refrain from doing so. Section 8(a)(1) of the Act prohibits employers from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Similarly, Section 8(b)(1)(A) of the Act prohibits a union from restraining or coercing employees in the exercise of the rights guaranteed in Section 7.

hired to perform work as carpenters were being covered by the terms of the collective-bargaining agreement.

Section 8(a)(3) prohibits, inter alia, discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization. However, it does permit an employer from making an agreement with a lawfully recognized union that would require membership on or after the 30th day following the beginning of employment or the effective date of the agreement whichever is the later.

In the construction industry, Section 8(f) of the Act permits an employer and union to enter into a prehire collective-bargaining agreement and to contract for a union security clause of 7 days.

But under either Section 8(a)(3) or Section 8(f), the statute prohibits an employer to condition the hiring of any employee on whether he or she is a member of a union or is not a member of a union.

If the provisions of the contract between The Cement League and employers performing services in New York City, explicitly required the employers to hire or give preference in hiring for all or a portion of their work force to members of the NYC Council, it would follow that such provisions would be unlawful on their face.

In that circumstance, cases cited by the General Counsel and the Charging Party would be dispositive. In *Bricklayers Local 1 (Denton's Tuckpointing)*, 308 NLRB 350, 351 (1992), the Board invalidated a contract provision that stated that "when members of Bricklayers Local Union No. 1 . . . are available they shall constitute at least 80% of the bricklaying force of the Employers at all times." In *Plasterers' Local 32*, 223 NLRB 486, 490 (1976), the following language in a contract was held to violate Section 8(b)(1)(A) and 8(b)(2); "it is agreed that at all times during the progress of any and all jobs, fifty percent (50%) of all plasterers employed by the contractors, plus the odd man, if any, shall have been dues paying members of the local in whose jurisdiction the work is being done, for the six (6) months preceding employment. The remaining fifty percent (50%) of the work force may be residents of the area or nonresidents at the discretion of the contractor." In *Carpenters Local 43 (McDowell Building & Foundation)*, 354 NLRB 1013, 1017 (2009), the Board concluded that there was a violation where the Union enforced a "mobility" clause against any individual who was not a member of Local 43.

In *Newspaper & Mail Deliverers Union (New York Post)*, 361 NLRB No. 26 (2014), the Board held that the Union violated the Act when its contracts with certain employers gave hiring preference to persons who had industry wide seniority with employers having contracts with the Union, irrespective of the fact that seniority included employment outside of the relevant collective- bargaining unit.

The point is that these cases all involved situations where there were contractual provisions that clearly and unambiguously required signatory employers to hire, for all or part of their work force, persons who were members of a particular union or whose seniority was based on nonunit length of service with employers having contracts with a particular union.

Strictly speaking, the contract provisions in the present case do not require any employer to hire all or a part of its work force for any project in New York City because such individuals are already members of the NYC Council. What they do require is that *if* an employer chooses to hire persons who are nonmembers, then the employer would be required to hire 50 percent of its work force from the NYC Council's job referral list that is also called, "the out of work list." And although it may be fairly assumed that there is strong probability that the

people on that list would be members of the NYC Council, there is no showing that the Union prevents or precludes nonmembers from registering for the list. (The record doesn't disclose the mechanics of how the list is created, maintained or utilized.) In this sense, the use by a union of a job referral list is the equivalent of a hiring hall, whether exclusive or nonexclusive.

5 And since the Board has, with some restrictions, sanctioned the utilization of both exclusive and nonexclusive hiring halls, I think that it would be fair to say that the Charging Party is not seeking, in the context of this case, for the Board to find that a collective-bargaining agreement that either requires or allows the use of a union hiring hall would be unlawful simply because that would tend to encourage membership in a union that was a party to such a contract.

10 The General Counsel and the Charging Party argue that articles VI and VII encourage employees to become members of the NYC Council and to drop their membership in the Northeast Council because those provisions state that when an employer wants to hire employees of its own choosing, the employees that it hires for a New York City project, who are
15 not members of the District Council, must be matched, essentially on a 50-50 basis, from the NYC Council's job referral list.

20 It is my understanding that there are employer members of The Cement League who perform work within New York City but who also work on projects in New Jersey, Long Island, and upstate New York. And when they work in those locations, outside the City, they operate under the contract with the Northeast Council. Similarly, it is my understanding that there are employers having a contract with the Northeast Council, who will obtain jobs within New York City and will operate as signatories under the auspices of The Cement League's Carpenters contract. So for example, in situations where an employer, such as Rogers & Sons Concrete
25 Inc., which ordinarily has performed work outside of the five boroughs and typically has employed a steady crew of Northeast Council members, obtains a job in New York City, it operates under The Cement League contract.⁴ And if that employer wants to bring its own work force to the City, the employees that comprise its steady crew would be strongly incentivized to transfer their union membership from Northeast Council locals to the NYC Council. This would
30 be because that crew normally would consist of employees who ordinarily would not be members of the NYC Council and as such, only half of them would be eligible for employment on a NYC project; with the other half being required to come from the NYC Council's job referral list.

35 The Cement League which is the nominal Respondent did not file a Brief and from statements made at the hearing, it appears to me that it is pretty much agnostic about the outcome of this case.

40 The NYC Council, as the Party in Interest, did file a Brief. But its arguments did not question the illegality of the contract provisions as such. Rather, its defense is that the contract was approved by United States District Court Judge Richard M. Berman in the context of a settlement of a civil RICO. (As noted above, that case involved serious allegations of corruption by union officers including some shop stewards.)

45 In asserting that the Board should defer to the District Court's approval of the collective-bargaining agreement and the provisions in issue here, the NYC Council asserts:

⁴ The record shows that Rogers & Sons Concrete Inc. is a construction industry contractor based in LaGrangeville, New York. It is a signatory to the contract between the Northeast Council and the Construction Industry Council of Westchester for work done in Hudson Valley. It is also a signatory to the Cement League collective-bargaining agreement with the NYC Council and therefore it operates under this latter contract when it utilizes carpenters for projects in New York City.

The anticorruption benefit of this provision is obvious. The District Council and the government benefit from having local New York City District Council members present on any job. If there is any misreporting, underreporting, “working off the books,” or any other corruption whatsoever on the job, it is believed that District Council members would have a sound interest in policing those matters and reporting them. Without a District Council presence beyond a Shop Steward among any given signatory employer’s workforce, the corruption that has plagued the District Council (e.g., “working off the books,” accompanying payoff schemes, etc.) could be accomplished by using strangers drawn from a different labor pool. In other words, contractors bound by District Council agreements could simply move to a neighboring locale (e.g. upstate New York, northern New Jersey, etc.) obtain their workforces from a Carpenters union affiliate in any of those places and bring them to New York City, all the while perpetuating the same fraud and corruption of years past. There would be no District Council carpenters tied to the Consent Decree to police against those corrupt practices.

The Charging Party’s response is:

The Cement League and the NYC District council argue that the purpose of the new language of Article VI, Section 2 and Article VII, Section 2 is to mandate that in addition to the Shop Steward, there are carpenters on the job who have a stake in ensuring that the contractual wages and benefits are paid on all hours worked. The merits of the argument, depend on acceptance of the dubious assumption that NYC District Council members are less corruptible than other carpenters, an assumption which seems to be more dubious in light of the history of corruption which resulted in the District Court’s intervention over the administration of the NYC District Council’s collective bargaining agreements. . . .

Whether having NYC Council members, as opposed to members of other Carpenter locals, on New York jobs would or would not be advantageous in fighting corruption, this is not an issue that can or should be decided by me. The fact is that the NLRB was not a party to the RICO action brought against the NYC Council and was not asked for and did not give any opinion as to whether the hiring provisions proposed for approval, would violate the National Labor Relations Act. Moreover, there is no indication that the provisions were evaluated in light of the NLRA. As such the Court’s approval of the contract is simply not binding on the Board, irrespective of the asserted public policy considerations. Accordingly, if the contract provisions violate the Act, they need to be remedied. Thus, in *Field Bridge Associates*, 306 NLRB 322, (1992), the Board stated:

The Board adheres to the general rule that if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully. *Allbritton Communications*, 271 NLRB 201, 202 fn. 4. . . . Underlying this rule is the long-recognized principle that “Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is

chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.” *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265 (1940). See also *National Licorice Co., v. NLRB*, 309 U.S. 362–364 (1940). . . . Thus the Board, as a public agency asserting public rights should not be collaterally estopped by the resolution of private claims asserted by private parties.... In this case, the Board was not a party to the New York State Court proceedings. Accordingly, we decline to give them a preclusive effect.

In light of the above, I am inclined to agree with the theory proposed by the General Counsel and the Charging Party and to conclude that the provisions of The Cement League’s collective-bargaining agreement unduly encourage membership in local unions affiliated with the NYC Council and tend to unduly discourage membership in the locals affiliated with the Northeast Council.

I am also going to reject the defense that the Board should defer to the fact that a contract, in the context of the RICO settlement, was approved by Judge Berman. I am doing so despite the fact that that lawsuit was not between private parties and involved a branch of the government other than the NLRB. As noted above, there is no indication that these particular provisions of the collective-bargaining agreement that was submitted for review and approval were considered in light of the statutory obligations set forth in the National Labor Relations Act.

Therefore, I conclude that the Respondent, The Cement League has violated Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended ⁵

ORDER

The Respondent, The Cement League, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining and/or otherwise giving effect to article VI, section 2, article VII, section 2, article VII, section 5, article VII, section 5(b), and article XIX, section 35 of its collective-bargaining agreement with the New York City and Vicinity District Council of Carpenters, that requires the giving of preference in the hiring or retention of employment to employees based upon membership or nonmembership in any labor organization except to the extent permitted by Section 8(a)(3) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Notify all employer-members of Respondent, bound by a collective-bargaining agreement with Respondent, that article VI, section 2, article VII, section 2, article VII, section 5, article VII, section 5(b), and article XIX, section 35 of the collective-bargaining agreement between Respondent and the New York City District Council of Carpenters, effective for the period July 1, 2011 through June 30, 2015, or any amendments thereto or successors thereof containing such provisions, are unlawful.

(b) Within 14 days after service by the Region, post at its office(s) in New York, New York, and any other geographic area covered by its collective-bargaining agreement with the New York City and Vicinity District Council of Carpenters, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent since April 21, 2014.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn statement of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. May 21, 2015

Raymond P. Green
Administrative Law Judge

⁶ If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain or otherwise give effect to any agreement with the New York City and Vicinity District Council of Carpenters requiring any employer bound by the collective-bargaining agreement to give preference in hiring or retention of employment to employees based on membership or nonmembership in any labor organization, except to the extent permitted by Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL notify all employers bound by our collective-bargaining agreement that any and all contract provisions or portions of contract provisions giving unlawful hiring preference based upon considerations of union membership, including article VI, section 2, article VII, section 2, article VII, section 5, article VII, section 5(b), and article XIX, section 35 will be given no further force or effect.

THE CEMENT LEAGUE

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Leo W. O'Brien Federal Building
Clinton Ave and N Pearl Street, Room 342
Albany, NY 12207-2350
Phone: (518) 431-4155

The Administrative Law Judge's decision can be found at www.nlr.gov/case/03-CA-126938 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER.